



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 212 and 252

[Docket DARS-2016-0015]

RIN 0750-AI93

Defense Federal Acquisition Regulation Supplement: Pilot Program on Acquisition of Military Purpose Nondevelopmental Items (DFARS Case 2016-D014)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Interim rule.

SUMMARY: DoD is issuing an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that changes the criteria for the pilot program on acquisition of military purpose nondevelopmental items.

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

Comment date: Comments on the interim rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]** to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2016-D014,

using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2016-D014" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2016-D014." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2016-D014" on your attached document.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2016-D014 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Mr. Dustin Pitsch, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Mr. Dustin Pitsch, telephone 571-372-6090.

SUPPLEMENTARY INFORMATION:

I. Background

This interim rule revises the DFARS to implement section 892 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 892 amends section 866 of the NDAA for FY 2011 (Pub. L. 111-383) to modify the criteria for use of the pilot program on acquisition of military purpose nondevelopmental items. Section 892 removes the requirements under the program for the use of competitive procedures and for awards to be made to nontraditional defense contractors. Section 892 also increases the threshold for use of the pilot program to contracts up to \$100 million.

Section 866 was implemented in DFARS rule 2011-D034, Pilot Program on Acquisition of Military Purpose Nondevelopmental Items (77 FR 2653), which allowed for the creation of the pilot program to test whether the streamlined procedures, similar to those available for commercial items, can serve as an effective incentive for nontraditional defense contractors to channel investment and innovation into areas that are useful to DoD and provide items developed exclusively at private expense to meet validated military requirements. The DFARS changes proposed by this rule will allow for increased opportunities to utilize the pilot program.

II. Discussion and Analysis

This rule amends DFARS subpart 212.71 by—

- Deleting the term “nontraditional defense contractor” and the associated definition;
- Removing the requirement that pilot program contracts be awarded using competitive procedures;
- Increasing the maximum contract award value threshold for use of the pilot program from \$53.5 million to \$100 million; and
- Revising the prescription for the provision at 252.212-7002 for use only when the pilot program will be used.

Conforming changes are made to DFARS provision 252.212-7002, Pilot Program for Acquisition of Military-Purpose Nondevelopmental Items, to include removal of the requirement at paragraph (c) for offerors to represent by submission of an offer that the firm is a nontraditional contractor.

This rule also makes one editorial change to provide at DFARS 212.7101 the full text of the definitions of “military-purpose nondevelopmental items” and “nondevelopmental items.”

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

DoD does not intend to apply the requirements of section 892 of the NDAA for FY 2016 to contracts at or below the simplified acquisition threshold (SAT) or for the acquisition of commercial

items, including commercially available off-the-shelf (COTS) items.

A. Applicability to Contracts at or Below the SAT

41 U.S.C. 1905 governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to such contracts or subcontracts. 41 U.S.C. 1905 provides that if a provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the SAT, the law will apply to them. The Director, Defense Procurement and Acquisition Policy (DPAP), is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD did not make that determination. Therefore, this rule does not apply below the simplified acquisition threshold.

B. Applicability to Contracts for the Acquisition of Commercial Items, Including COTS Items

41 U.S.C. 1906 governs the applicability of laws to contracts for the acquisition of commercial items, and is intended to limit the applicability of laws to contracts for the acquisition of commercial items. 41 U.S.C. 1906 provides that if a

provision of law contains criminal or civil penalties, or if the FAR Council makes a written determination that it is not in the best interest of the Federal Government to exempt commercial item contracts, the provision of law will apply to contracts for the acquisition of commercial items. Likewise, 41 U.S.C. 1907 governs the applicability of laws to COTS items, with the Administrator for Federal Procurement Policy the decision authority to determine that it is in the best interest of the Government to apply a provision of law to acquisitions of COTS items in the FAR. The Director, DPAP, is the appropriate authority to make comparable determinations for regulations to be published in the DFARS, which is part of the FAR system of regulations. DoD did not make that determination. While FAR part 12 commercial procedures may be used to acquire military purpose nondevelopmental items under this pilot program, the rule will not apply to the acquisition of commercial items.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule is necessary to implement section 892 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016.

The objective of the rule is to modify the criteria for the pilot program at DFARS subpart 212.71, Pilot Program for the Acquisition of Military Purpose Nondevelopmental Items, to increase the opportunities for use of the program. The rule removes the criteria that contracts must be awarded to "nontraditional defense contractors" and awards must be made using competitive procedures. The rule also increases the dollar threshold for the program to allow use on procurements up to \$100 million.

The changes to the pilot program will have a positive economic impact on small businesses that did not meet the definition of "nontraditional defense contractors" and have developed products that could be applied to a military purpose. According to data available in the Federal Procurement Data System for FY 2015, 6,514 unique small businesses were awarded a DoD contract in excess of the certified cost and pricing threshold (\$750,000) and therefore did not meet the definition of "nontraditional defense contractor." Prior to the changes made by this rule these small businesses were not eligible for an award under the pilot program. These small businesses will now be able to participate in the pilot program if they are developing a military purpose nondevelopmental item.

This rule does not impose any new reporting, recordkeeping or other compliance requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. No significant alternatives were identified during the development of this rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit

such comments separately and should cite 5 U.S.C 610 (DFARS Case 2016-D014) in correspondence.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

VII. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This interim rule implements section 892 of the NDAA for FY 2016 (Pub. L. 114-92), which amended section 866 of the NDAA for FY 2011 (Pub. L. 111-383) to—

- Modify criteria for use of the pilot program in order to increase opportunities for use;
- Remove the requirements under the program to use competitive procedures;
- Remove requirements for awards to be made to nontraditional defense contractors; and
- Increase the threshold for use of the program to contracts up to \$100 million.

The purpose of the pilot program is to test whether the streamlined procedures, similar to those available for

commercial items, can serve as an effective incentive for nontraditional defense contractors to channel investment and innovation into areas that are useful to DoD and provide items developed exclusively at private expense to meet validated military requirements. This action is necessary because the pilot program expires on December 31, 2019, and, in order to realize any of the benefits from the statutory modifications made by this rule prior to the expiration of the pilot program, the changes made by this rule must take effect immediately. However, pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 212 and 252

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 212 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 212 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1

PART 212—ACQUISITION OF COMMERCIAL ITEMS

212.7100 [Amended]

2. Section 212.7100 is amended by removing "(Pub. L. 111-383)" and adding "(Pub. L. 111-383), as modified by section 892 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)" in its place.

3. Section 212.7101 is revised to read as follows:

212.7101 Definitions.

As used in this subpart—

Military-purpose nondevelopmental item means a nondevelopmental item that meets a validated military requirement, as determined in writing by the responsible program manager, and has been developed exclusively at private expense. An item shall not be considered to be developed at private expense if development of the item was paid for in whole or in part through—

(1) Independent research and development costs or bid and proposal costs, per the definition in FAR 31.205-18, that have been reimbursed directly or indirectly by a Federal agency or have been submitted to a Federal agency for reimbursement; or

(2) Foreign government funding.

Nondevelopmental item is defined in FAR 2.101 and also includes previously developed items of supply that require modifications other than those customarily available in the commercial marketplace if such modifications are consistent with the requirement at 212.7102-1(c)(1).

212.7102-1 [Amended]

4. Amend section 212.7102-1 by—
 - a. In the introductory text, removing “The contracting officer may enter into contracts with nontraditional defense contractors for” and adding “The contracting officer may utilize this pilot program to enter into contracts for” in its place;
 - b. Removing paragraph (a);
 - c. Redesignating paragraphs (b) through (e) as paragraphs (a) through (d), respectively;
 - d. In the newly redesignated paragraph (b), removing “\$53.5 million” and adding “\$100 million” in its place; and
 - e. In the newly redesignated paragraph (c)(2), removing “(d)(1)” and adding “(c)(1)” in its place.

212.7103 [Amended]

5. Amend 212.7103 by removing “in all solicitations” and adding “in solicitations” in its place, and removing “for this pilot program” and adding “and plan to use the pilot program” in its place.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212-7002 [Amended]

6. Amend section 252.212-7002 by—
 - a. Removing the clause date “(JUN 2012)” and adding “(JUN 2016)” in its place;
 - b. In paragraph (a)–

i. For the definition of "nondevelopmental item", removing "FAR 2.101 and for the purpose of this subpart also includes" and adding "FAR 2.101 and also includes" in its place, and removing "of DFARS 212.7102-2(d)(1)" and adding "at DFARS 212.7102-1(c)(1)" in its place; and

ii. Removing the definition of "nontraditional defense contractor";

c. In paragraph (b), removing "Nondevelopmental Items," and adding "Nondevelopmental Items, as modified by section 892 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92)," in its place; and

d. Removing paragraph (c).

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